United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-6093

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

LE BEAU TOURS INTER-AMERICA, INC.,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OF PLAINTIFF-APPELLANT

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, we petition for a rehearing, and we respectfully suggest that the appeal be heard by the Court en banc.

The grounds for the petition for rehearing are that, in our opinion, the Court has overlooked or misapprehended the points of law or facts referred to below.

The suggestion to refer the matter to the Court en banc is made because the present decision is in conflict with a previous decision by another panel of this Court, as well as previous decisions of the Courts of Appeal for the Fifth Circuit, the Seventh Circuit, and the Ninth Circuit, as well as the Court of Claims and at least two Treasury Rulings.

The conflicting previous decision of this Court is Com. v. Pfaudler, 330 F2d 471 (1964) decided by Judges Lumbard, Waterman and Friendly. (discussed below).

I.

This petition advances no new argument. We are aware that Rule 40 does not sanction reargument of the same matter, "in the absence of a demonstrable mistake" (U.S. v. Doe, 455 F2d 753,

762 (CA-1, 1972)) vacated on other grounds sub nom. in Gravel v. U.S., 408 U.S. 606. In the instant case, there is demonstrable mistake in that

(a) The opinion disregards the authorities cited in Appellant's brief; it neither distinguishes nor reconciles the judicial precedents which are contrary to the Court's conclusion;

(b) There are factual misapprehensions, as stated below;

(c) The opinion overlooks or misapprehends the established tax concepts of source of income.

II.

While this Court properly demands that an appellant submit a carefully reasoned and thoroughly documented brief, it is discouraging if the Court's decision, whether or not it affirms the court below, fails to address itself to the basic points raised by an appeal. Judging from the text of the per curiam opinion in this case it would appear that the Court has overlooked or misapprehended the following:

1. Appellant claims that it is a purchasing agent for American tourists who seek accommodations in Central and South America, and that its only compensable services as such purchasing agent consist of procuring the desired facilities abroad. The Court has rejected this basic premise of the case, but the opinion states: "Le Beau claims it receives its income by making arrangements for hotel accommodation and ground services for, and providing some ground services to, overseas travelers... But Le Beau does not provide these services. It merely purchases them from foreign 'ground operators' for its American clients." (Underlining supplied). The quoted language of the decision seems to confirm rather than refute the taxpayer's position because purchasing is a service performed in the country where the purchase is made. Rev. Rul. 56-477 (Appellant's Brief p. 19).

2. Another factual misapprehension is found in the part of the opinion which reads: "These services are part of the means whereby Le Beau fosters American travel to Latin America and are not, as Le Beau contends, mere 'expenses' of its business." The reference to such contention is not supported by anything contained in the Record.

It seems to have escaped the Court's attention that in almost all WHTC cases, the WHTC avails itself of

administrative assistance of a local affiliate, usually the parent company, as demonstrated by the decisions cited in Appellant's brief.

3. The opinion fails to distinguish between the 95% source of income test of Sec. 921 (i) IRC and the 90% activities test of Sec. 921 (ii) IRC. The District Judge's failure to recognize this statutory distinction was advanced as one of the principal points of the appeal. The opinion seems to overlook this point altogether. The opinion seems to conclude that taxpayer has not met the 95% source of income test because less than 95% of its activity takes place outside the United States. The Court disregards the argument that since a WHTC must be a domestic corporation with a domestic headquarters operation, it is entirely unrealistic and contrary to the letter and the spirit of the statute to require, that not more than 5% of the corporation's activity takes place at its headquarters.

Non-compensable administrative activity has heretofore not been held to be a source of income.

4. The opinion seeks to justify its conclusion by a bare citation of Sec. 862(a)(3) and Treas. Reg. 1.861-4(b)(2). The Court has not dealt with the argument in Point II of the

Appellant's brief that Sec. 862 and Sec. 861 are not applicable because (i) these statutes which deal with the taxation of non-resident aliens do not necessarily cover WHTC or other situations involving source of income. (Rev. Rul 70-304) and (ii) Sec. 863 IRC expressly bars the application of Sec. 862 and Sec. 861 in this case.

5. The opinion does not deal with taxpayer's contention that "source of income" is a technical concept as exemplified by Rev. Rul. 63-269, Rev. Rul. 73-68, Howkins, 49 TC 689 (1968), and British Timken, 12 TC 880 (1949). It does not appear that the Court considered these authorities, which taxpayer cited in support of the contention that the source of its income was without the United States.

It is particularly noteworthy that the Court has apparently overlooked the landmark decision of Com. v. Piedras Negras, 127 F2d 260 (CA-5, 1942), which is discussed on pages 8-9 of Appellant's brief, cited throughout that brief, and which for over 30 years has been the leading authority on the source of income test. In that case, broadcasting services were rendered abroad. However, the revenue of the broadcaster was derived from U.S. advertisers, who were solicited by a U.S. sales force and who paid in Texas. In spite of this organizational and

administrative activity in the U.S., the source of income was held to be Mexico, where the broadcasts emanated.

6. The Court has not dealt with the argument that the source of income is the situs of the completion of the transaction which gives rise to the income (Point IV of Appellant's brief). The substantial authorities cited in support of this Point do not seem to here have been considered.

7. Appellant submitted in Point V of its brief that the income was earned without the United State, subsequent to the supply of the foreign accommodations to the American traveler. Among the pertinent authorities cited was Com. v. East Coast Oil Co., 85 F2d 322 (CA-5, 1936). where it was pointed out that the mere execution of a contract does not result in profit, nor is the collection of the price indicative of the source of income. The present opinion disregards this line of reasoning altogether, although it concludes that the administrative activity at New York headquarters must be regarded as source of income.

8. In footnote 3, the opinion deals with the taxpayer's contention that the activities of taxpayer's sister corporation are irrelevant for the determination of taxpayer's income.

The Court is "not persuaded" by this argument and concludes that Judge Gagliardi "correctly rejected this claim".

In thus following Judge Gagliardi, the Court again equated the activity of a WHTC with its source of income, which is contrary to the statutory distinction in Sec. 921 IRC (see para. "2", supra).

Also, the Court's conclusion is contrary to the judicial precedents cited in Point VI of Appellant's brief, which hold that the activities of a domestic affiliate which performs some of the work of a WHTC are disregarded in determining the source of income of a WHTC. While these precedents are not binding on this Court, it does not appear from the opinion that the Court has considered the judicial precedents.

9. One of the precedents is this Court's own prior decision (by a different panel) in Com. v. Pfaudler, 330 F2d 471 (1964). In that case a domestic manufacturer of brewery equipment organized a WHTC, a wholly-owned subsidiary. The parent transferred title to equipment made by it to the WHTC in whose name it was then exported. The Commissioner refused to recognize that the source of the income of the WHTC was outside the U.S, because the more important business activities

took place in the U.S.* This seems to be also the reasoning of the Court in the instant case. Three other members of this Court found that reasoning unpersuasive in Pfaudler.

The present decision is also in conflict with the Fifth Circuit (Piedras Negras, supra, and East Coast Oil, supra), the Seventh Circuit (Hammond Organ, 327 F2d 964 (1964), and Baldwin-Lima, 435 F2d 182 (1970)), the Ninth Circuit (Frank 308 F2d 520 (1962)), the Court of Claims (A.P. Green, 284 F2d 383 (1960) and Eli Lily 372 F2d 990 (1967)) and Revenue Rulings 63-269 and 70-304.

10. The only precedent which is quoted in the opinion is Tipton & Kalmbach, 480 F2d 1118 (CA-10, 1973), but the Court fails to deal with Appellant's contention that this case is clearly distinguishable from the instant case because there,

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* The Pfaudler decision refers in footnote 4 to the facts stated in the Tax Court's opinion in 22 CCH Tax Ct. Rep. December 26, 071 (M) (April 17, 1963). A review indicates that the Pfaudler WHTC was an in house subsidiary; that all its accounting, credit, clerical and administrative work was performed by the parent at the common headquarters in Rochester, N.Y., that the WHTC had no employees of its own and that, as in the instant case, the government argued that substantial and significant activities of the WHTC occurred in the United States. The Tax Court and the Court of Appeals ruled that all this was immaterial for the determination of the WHTC's source of income.

the contract expressly stipulated that compensable services were to be rendered in Pakistan and Colorado, whereas here the only compensable services were the purchasing and packaging activities in Central and South America.

III.

An en banc decision, in accordance with Rule 35 would seem to be appropriate in the interest of uniformity, because:

(1) The decision of the present panel is in conflict with a holding in a prior decision of another panel. Such conflict is appropriately resolved by an en banc decision. (U.S. v. Lewis, 475 F2d 571, 574 (CA-5, 1973); Fulford v. Klein, 529 F2d 377, 379 (CA-5, 1976).

(2) The decision of this Court is in conflict with decisions in three other Circuits, the Court of Claims, and certain Revenue Rulings issued by the Commissioner of Internal Revenue.

IV.

For the foregoing reasons we respectfully request a

rehearing and suggest that this request be referred to the en banc Court.

Respectfully submitted,

LYNTON KLEIN OPTON & SASLOW
Attorneys for Petitioner
(Plaintiff-Appellant)
100 Park Avenue
New York, New York 10017

By: _____
A member of the firm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LE BEAU TOURS INTER-AMERICA, INC.,

Plaintiff-Appellant, Docket No. 76-6093

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

CERTIFICATE OF SERVICE

----------X

It is hereby certified that service of two copies of Appellant's Petition for Rehearing has been made on counsel for the Appellee on this 6th day of December, 1976, by mailing a copy thereof to him in an envelope, with postage prepaid, properly addressed to him as follows:

Robert B. Fiske, Jr., Esq.
United States Attorney for the
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

DAVID WERCHEN,
Attorney

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

DOCKET NO. 76-6093

~~XXXXXXXXX~~ ~~XXX~~

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

LYNTON KLEIN OPTON & SASLOW

Attorneys for

Office and Post Office Address

100 Park Avenue

Borough of Manhattan **New York, N. Y. 10017**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir. —Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

LYNTON KLEIN OPTON & SASLOW

Attorneys for

Office and Post Office Address

100 Park Avenue

Borough of Manhattan **New York, N. Y. 10017**

To

Attorney(s) for

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LE BEAU TOURS INTER-AMERICA, INC.,

Plaintiff-Appellant

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

PETITION FOR REHEARING.

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MUrray Hill 3-9500

Service of a copy of the within is hereby admitted.

Dated, N. Y., 19

Attorney for